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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 601

J. D. LEWIS and ZELMA W. LEWIS,
Petitioners,

VERSUS

SPENCER CARVER, Trustee,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEROF

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November, 1956.

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In the
Supreme Court of the United States
OCTOBER TERM, 1956

No. .....

J. D. LEWIS and ZELMA W. LEWIS,
Petitioners,

VERSUS

SPENCER CARVER, Trustee,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Come now J. D. Lewis and Zelma W. Lewis, petitioners, and pray that Writ of Certiorari issue to review order, judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on October 1, 1956, denying relief to the petitioners.

OPINIONS BELOW

The issues on this petition concern three decisions, being the judgment of the United States District Court for the Northern District of Texas (Dallas Division), the opin-

ion of the United States Court of Appeals, Fifth Circuit, dismissing the appeal and the opinion of the Court of Appeals, Tenth Circuit, entered on October 1, 1956. Said opinions are attached hereto and shown in full in the Appendix in the order in which they are named above.

JURISDICTION

The order sought to be reviewed was entered by the Court of Appeals, Tenth Circuit, on October 1, 1956 (See paragraph above), rehearing denied October —, 1956. Jurisdiction of this Court is invoked under 28 U.S.C., Art. 1254(1).

QUESTIONS PRESENTED IN THIS PETITION

1. The original alleged cause of action was a mortgage foreclosure in the State District Court in Dallas, Texas, in which the petitioner J. D. Lewis was defendant. The respondent here, Spencer Carver, trustee, was the attorney for the plaintiff. After the issues had been made and the *res* in complete and full jurisdiction of the State District Court and a pre-trial had, Spencer Carver who appears here as trustee, being the attorney for the J. R. Watkins Company, which was the plaintiff in the State Court versus J. D. Lewis, filed a purported action in the United States District Court for the Northern District of Texas styled Spencer Carver, Trustee versus J. R. Watkins Company (his client), J. D. Lewis, and others, in which he sought to, and apparently did, invoke the jurisdiction of the Federal Court and had a summons served upon himself as the attorney for the J. R. Watkins Company in the Federal Court,

and over the protest and objection of J. D. Lewis the case was tried in the United States District Court for the Northern District of Texas. The question therefore on that point is whether or not a Federal Court can thus acquire jurisdiction and take a case out of the jurisdiction of the State Court while the case is still pending in the State Court and the same *res* involved. The proceedings thereafter in the Federal Court will be detailed more fully in the brief hereto attached and made a part of this petition and in support of this petition.

The petitioners here contend that the United States District Court had no jurisdiction whatsoever and that all of its acts and the other federal courts was without authority, and the void and purported judgment of the United States District Court for the Northern District of Texas thus obtained is being attacked in this petition as an absolutely void judgment for that reason and for the following reason.

2. The second reason for the granting of the writ in this case, the petitioner shows, is that in the case in the United States District Court for the Northern District of Texas a jury trial was demanded in writing and in accordance with the Rules of Civil Procedure and the Constitution of the United States of America, which jury trial was proper and a jury question presented, all as will be more fully set forth in the brief supporting this petition, and the petitioners here contend that said judgment so rendered by the United States District Court for the Northern District of Texas is void for such last named reason, namely the denial of a jury trial in a proper case after proper and due demand for a jury trial in writing.

Thus there is presented to this Court a petition for certiorari on the two grounds above set out. Briefly: Can a federal court take jurisdiction of property already in the jurisdiction of the state court and thereby oust the state court of jurisdiction when these matters are properly raised in the federal court and fully presented? Can a federal court deny a jury trial in a civil case after due and proper demand in a case which is triable to a jury, and are these matters jurisdictional, and do they deny a citizen of the United States due process of law? The petitioners here show to this Honorable Court that they will fully set out in the brief hereto attached and in the Appendix to this petition the judgment and facts as reflected by the record and the authorities in support of their contention.

The petitioners show that after the United States District Court rendered judgment in favor of Spencer Carver, trustee, and in favor of his client J. R. Watkins Company, who was defendant in said cause against the petitioner J. D. Lewis, a motion to vacate the judgment was filed setting forth that the judgment was void for the reasons hereinabove set forth, which motion was by the court overruled, and thereafter an appeal was perfected to the Circuit Court of Appeals, Fifth Circuit, and said Court of Appeals, Fifth Circuit dismissed the appeal, certiorari was then sought in the Supreme Court of the United States, which proceedings are reflected in the following: *J. D. Lewis* v. *Spencer Carver, Trustee*, 223 F.2d 867; *certiorari denied*, 350 U.S. 883, 76 Sup. Ct. 135, 100 L. Ed. 78; *rehearing denied*, 350 U.S. 926, 76 Sup. Ct. 211, 100 L. Ed. 139. The judgment rendered by the United States District Court, Northern District of Texas, was certified to the United States District Court,

Eastern District of Oklahoma, and execution issued, and the petitioners here then filed suit in the United States District Court, Eastern District of Oklahoma, asking the court to restrain the enforcement of the judgment for the reason the same was void. The United States District Court for the Eastern District of Oklahoma dismissed the complaint, whereupon the petitioners appealed to the United States Court of Appeals, Tenth Circuit, and the United States Court of Appeals, Tenth Circuit, affirmed the judgment and order of the trial court dismissing appellants' complaint. Petition for rehearing was filed in the United States Court of Appeals, Tenth Circuit, and denied. Thus the case comes to this Court on Petition for Certiorari for the second time.

WHEREFORE, petitioners most respectfully pray that this Court take jurisdiction herein, grant the Writ of Certiorari and issue its opinion decreeing said purported judgment rendered by the United States District Court, Northern District of Texas, void and of no force and effect, and direct the Circuit Court of Appeals, Tenth Circuit, to issue its order and judgment in accordance therewith.

Respectfully submitted,

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Attorney for Petitioners.

November, 1956.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BRIEF STATEMENT OF FACTS

Since the petition contains generally the facts in this case, our statement here of what actually occurred will be brief.

The J. R. Watkins Company held a mortgage signed by J. D. Lewis on an air-conditioned business building in Dallas Texas, and the mortgage also covered a residence in the City of Dallas, Texas. (In Texas a mortgage is referred to as a deed of trust.) Mr. Lewis contended that he was entitled to credits on the note and mortgage in a sum equal to or approximately equaling the amount of the note secured by the mortgage. The J. R. Watkins Company was represented by Mr. Spencer Carver and a suit was brought in the State District Court in Dallas. Mr. Lewis answered and set up his counter-claim or set-off, various hearings were had in the state court and the issues were joined. In this suit Mr. Lewis asked the Court to cancel the note and mortgage and the plaintiff J. R. Watkins Company contended that no payments had been made. Therefore the *res*, the real property, was within the jurisdiction of the State District Court and was thereby in the exclusive jurisdiction of the State District Court. After a pre-trial had been had in the State District Court, Mr. Carver filed a complaint in the United States District Court naming his client the J. R. Watkins Company, a corporation, defendant, together with J. D. Lewis and others. He then had service of process upon his own client, the J. R. Watkins Company,

by serving himself, although he was the plaintiff, and had process served on Mr. Lewis while the case was still pending and ready for trial in the State District Court involving the identical property or *res* and the identical controversy. Mr. Lewis appeared before the United States Court and filed motion to dismiss for the reason that the case or controversy between the Watkins Company and Mr. Lewis was pending in the state court, and that the same *res* was involved and therefore the federal court had no jurisdiction. This was by the United States District Court overruled although certified copies of the pleadings in the state court were attached to the motion to dismiss and it was there admitted that the cause was pending in the state court.

The defendant Lewis then filed in the United States District Court in due time his written request and demand for a jury trial in accordance with the Rules of Civil Procedure and the Constitution of the United States. This was denied. After judgment Mr. Lewis filed a motion to vacate the judgment on the ground that it was void for the two reasons indicated above, namely, that the same case was pending in the state court and the federal court could not thereby defeat the jurisdiction of the state court as the state court had exclusive jurisdiction and for the reason that the court had denied him a jury trial and therefore its judgment was absolutely void. The court overruled these motions and an appeal was perfected to the United States Court of Appeals, Fifth Circuit, and the United States Court of Appeals, Fifth Circuit, dismissed the appeal on the ground and for the reason that it said in its opinion that Mr. Lewis could not appeal from such order and therefore dismissed the appeal. Petition for Certiorari was filed in

the United States Supreme Court as set forth and cited in the Petition for Certiorari herein. The same was denied. The judgment rendered by the United States District Court, Northern District of Texas, was then filed in the Eastern District of Oklahoma with the Clerk of the United States District Court and execution was issued. Thereupon Mr. Lewis filed suit to enjoin the enforcement of the judgment on the ground and for the reason that the judgment was void for the reasons above given. The complaint was dismissed and an appeal was perfected to the United States Court of Appeals Tenth Circuit by Mr. Lewis resulting in an opinion affirming the action of the United States District Court for the Eastern District of Oklahoma. Hence this Petition for Certiorari to this Court is the only relief left for the petitioners herein.

The record here reflects that no court except the United States District Court for the Northern District of Texas has ever passed upon the merits of petitioners' contentions, namely, whether or not the United States Court for the Northern District of Texas had jurisdiction, and that is the only question we are attempting to present here, although Mr. Lewis's property worth $25,000.00 as a minimum was sold for $2,000.00 and bought in by Mr. Carver. We are not here giving the book and page of the record for the reason that the record has not as yet been printed for consideration by this Court although it is filed herewith, but the facts as related herein are supported by the written record and no controversy could be raised as to the correctness of the statements herein set out.

It therefore leaves the petitioners in this condition: their property worth as a minimum of $25,000.00 and sold

and they only have a $2,000.00 credit on the judgment. They were denied a right to have their cause tried by a jury after due request. They were brought from the state court over their protest into the federal court which had no jurisdiction whatever, and their property has been wrongfully taken from them and a judgment equaling almost $50,000.00 still standing against them, and they have actually had no trial. The petitioners are merely seeking to get some court somewhere to decide these two important questions and whether or not the Constitution of the United States means that they are entitled to a jury trial, and whether or not the federal court can thus invade the jurisdiction of the state court and brush it aside and destroy the rights of a citizen.

The case is presented here, therefore, on the question of whether or not the petitioners have been accorded due process of law. With this statement before the Court we will now present to the Court the authorities upon which we feel completely present and support the proposition of the petitioners.

Proposition 1.

The United States District Court for the Northern District of Texas did not have jurisdiction by virtue of the pendency of the same cause involving the same *res* in the state court.

We wish to cite the following authorities in support of our Proposition 1:

The case of *Reconstruction Finance Corporation* v. *Zimmerman*, 76 F.2d 313, Circuit Court of Appeals, Fourth Circuit (South Carolina), the Court said in part as follows:

"Court of one jurisdiction will not interfere with courts of another jurisdiction, especially federal court coming in conflict with state court."

And in the body of the opinion:

"Innumerable decisions could be cited sustaining the proposition that it is not only a rule of comity, but one of necessity, that courts of one jurisdiction will not interfere with courts of another jurisdiction, and this is especially true with regard to the care always taken by the federal courts not to come in conflict with the jurisdiction of a state court. This rule is a necessity because of our dual form of government and courts. It will not do to assume that a litigant cannot obtain justice in one jurisdiction or other and his proper remedy is to apply to that court which is already administering the matter."

In the case of *Sharar* v. *Pollia et al.*, United States Court of Appeals, Tenth Circuit, 191 F.2d 116, the Court said as follows:

"The principle, applicable to both federal and state courts, that court first assuming jurisdiction over property may maintain and exercise that jurisdiction to exclusion of other, is not restricted to cases where property has been actually seized under judicial process before second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, liquidate estates, and in suits of similar nature where, to give effect to its jurisdiction, court must control property."

And in the body of the opinion:

"The subject matter of a federal action and of the garnishment phase of the state action was the same.

The primary object of the federal action was to subject Pollia's claim against Nickel first to the satisfaction of Pollia's creditors, who had claims against the fund. So likewise the purpose of the garnishment proceeding was to subject Pollia's claim against Nickel to the satisfaction of one of Pollia's creditors, Sharar, who was also a use plaintiff in the federal action. So considered, both actions were *in rem* or *quasi in rem* to administer a debt for the benefit of those entitled thereto.

"The authorities all hold that in such instances the court first acquiring jurisdiction of the *res* holds it to the exclusion of all other courts. The federal action was instituted first and the federal court thereby acquired the exclusive jurisdiction to administer the fund.

"In *Wallace* v. *McConnell*, 13 Fed. 136, 38 U.S. 136, 10 L. Ed. 95, McConnell sued Wallace in the federal court of Alabama on a $4,800.00 note. Thereafter one Blocker and others sued McConnell in the state court and garnisheed Wallace. The Supreme Court held that the jurisdiction of the federal court was exclusive and that 'the jurisdiction of the district court of the United States and the right of plaintiff to prosecute his suit in that court, having attached, *THAT RIGHT COULD NOT BE ARRESTED OR TAKEN AWAY BY THE PROCEEDINGS IN ANOTHER COURT.*' The ruling was predicated on the theory that the subject matter of the two suits was the same. To the same effect see *Lowenstein* v. *Levy*, 6 Cir. 212 F. 383, and *Mack* v. *Winslow*, 6 Cir., 59 F. 316. The *Wallace* case was before the Supreme Court again in *Huron Holding Corporation* v. *Lincoln Mine Operating Co.*, 312 U.S. 183, 61 S. Ct. 513, 518, 85 L. Ed. 725. In *Princess Lida of Thurn and Taxis* v. *Thompson*, 305 U.S. 456-466, 59 S. Ct. 275, 280, 83 L. Ed. 285, the court said: 'We have said that the

> principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has been actually seized under judicial process before a second suit is instituted, but applies as well where suits are brought to marshal assets, administer trusts, or liquidate estates, and in suits of a similar nature where to give effect to its jurisdiction, the court must control the property.'
>
> "To grant the relief first sought in the federal court, to marshal assets which consisted of Pollia's claim against Nickel, to determine the amount and priority of all claims and make distribution of the fund accordingly, it was necessary for the court to exercise jurisdiction over the *res* or the debt. That action being first in time gave the federal court exclusive jurisdiction of the fund and no creditor of Pollia's could acquire rights to the fund by subsequent proceedings in another court."

In *Hart* v. *United States*, 207 F.2d 813, the United States Court of Appeals, Eighth Circuit, in Syllabus 4, said as follows:

> "Where suits are *in rem* or *quasi in rem*, requiring that the court or its officer have possession or control of property which is subject of suit, court first assuming jurisdiction over the property may exercise jurisdiction to exclusion of other court having concurrent jurisdiction, and this rule applies to suits in equity for control by receivership of assets of an insolvent corporation."

In the case of *Palmer* v. *State of Texas*, 212 U.S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435, United States Supreme Court, the Court stated:

"If the state court had acquired jurisdiction over the property by the proceedings for the appointment of its receiver, and had not lost the same by the subsequent proceedings, then, upon well-settled principles, often recognized and enforced in this court, there should be no interference with the action of the state courts while thus exercising its authorized jurisdiction. The Federal and state courts exercise jurisdiction within the same territory, derived from and controlled by separate and distinct authority, and are therefore required, upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovereignty. If a court of competent jurisdiction, Federal or State, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property has been entirely removed to the territory of another sovereignty. *Wabash R. Co.* v. *Adelbert College*, 208 U.S. 38, 52 L. Ed. 379, 28 Sup. Ct. Rep. 182, and previous cases in this court, cited therein at page 54."

In the case of *Toucey* v. *New York L. Ins. Co.*, 314 U.S. 118, 62 Sup. Ct. 139, 86 L. Ed. 100, 137 A.L.R. 967, the United States Supreme Court, stated in part as follows:

"And where a state court first acquires control of the *res*, the Federal courts are disabled from exercising any power over it, by injunction or otherwise."

The case of *Prudential Ins. Co. of America* v. *Zimmerer et al.*, 66 F. Supp. 492, citing many authorities on the question, stated as follows:

"(3) No controversy exists between the parties upon a primary rule of jurisdiction and procedure as between state courts and federal courts. Recognizing

that a different rule obtains in actions strictly *in personam*, they agree that when two suits *in rem*, or *quasi in rem*, involving the same issue are pending, one in a federal court, the other in a state court, the court which first assumes jurisdiction over the property may maintain and exercise that jurisdiction to final effect and to the exclusion of the other court. The rule was well stated in *Kline* v. *Burke Construction Co.*, *supra*, in the following language:

"'* * * where a federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the federal court. Where the action is *in rem* the effect is to draw to the federal court the possession or control, actual or potential, of the *res*, and the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same *res* to defeat, or impair the state court's jurisdiction.' *Hagan* v. *Lucas*, 10 Pet. 400, 9 L. Ed. 470; *Taylor* v. *Carryl*, 20 How. 583, 15 L. Ed. 1028; *Freeman* v. *Howe*, 24 How. 450, 16 L. Ed. 749; *Covell* v. *Heyman*, *supra*; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. Co.*, *supra*; *Palmer* v. *State of Texas*, 212 U.S. 118, 29 S. Ct. 230, 53 L. Ed. 435; *United States* v. *Bank of New York & Trust Co.*, 296 U.S. 463, 56 S. Ct. 343, 80 L. Ed. 331; *Princess Lida of Thurn and Taxis* v. *Thompson*, 305 U. S. 456, 59 S. Ct. 275, 83 L. Ed. 285; *Toucey* v. *New York Life Ins. Co.*, 314 U.S. 118, 62 S. Ct. 139, 86 L. Ed. 100, 137 A.L.R. 967; *Meredith* v. *Winter Haven*, 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9; *Butler* v. *Judge of United States District Court*, 9 Cir., 116 F.2d 1013;

Wolf v. *District Court*, 9 Cir. 235 F. 69; *Dennison Brick & Tile Co.* v. *Chicago Trust Co.*, 6 Cir., 286 F. 818; *Amusement Syndicate Co.* v. *El Paso Land Improvement Co.*, D.C. Tex., 251 F. 345; *Union Sulphur Co.* v. *Texas Gulf Sulphur Co.*, D.C. Tex., 32 F.2d 517; *City of Orangeburg* v. *Southern Railway Co.*, D.C.S.D. 45 F. Supp. 734; and *Westfeldt* v. *North Carolina Mining Co.*, 4 Cir., 166 F. 706."

In the case of *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 43 Sup. Ct. 79, 81, 67 L. Ed. 226, 24 A.L.R. 1077, United States Supreme Court, the Court stated in part as follows:

"It is settled that where a Federal court has first acquired jurisdiction of the subject-matter of a cause, it may enjoin the parties from proceeding in a state court of concurrent jurisdiction where the effect of the action would be to defeat or impair the jurisdiction of the Federal court. Where the action is *in rem*, the effect is to draw to the Federal Court the possession or control, actual or potential of the *res*, and the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the Federal court, already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the Federal court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction.

"This court, in *Covell* v. *Heyman*, 111 U.S. 176, 182 28 L. Ed. 390, 392, 4 Sup. Ct. Rep. 355, said:

" 'The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction than the utility which comes from concord; but be-

> tween state courts and those of the United States, it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the court from which it issues'."

The appellant therefore feels that there is no question but that the United States District Court for the Northern District of Texas had absolutely no jurisdiction for the reason that the case pending in the state court involved the *res* between the same parties, and in the cases cited above it will be noted that the courts have uniformly held that in a case in action *in rem* or *quasi in rem* the court first acquiring jurisdiction retains it exclusive of every other court. Therefore, the State District Court in Dallas, Texas, retained jurisdiction to the exclusion of the United States District Court for the Northern District of Texas.

The Court in these cases held that the federal court had no right or jurisdiction over the *res* and fully discusses the question herein presented with reference to jurisdiction. The court discusses both the judicial question from a standpoint of an action *in personam* or *in rem* or *quasi in rem* and announces the rule to be that if the action is *in rem*

or *quasi in rem*, the court first acquiring jurisdiction retains the same to the exclusion of every other court.

Title 28, U.S.C.A., Article 2283, is as follows:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

We think that the act of the United States District Court, Northern District in Dallas, in taking over the property involved in the state court in adjudicating the controversy between Lewis and the Watkins Company pending in the state court was wholly without jurisdiction and absolutely void beyond a question of a doubt. The United States Court of Appeals, Fifth Circuit, in the case of *Albuquerque Nat'l Bank* v. *Citizens Nat'l Bank in Abilene et al.*, 212 F.2d 943, said in the body of the opinion as follows:

> "We think that the action pending in the United States District Court for the Northern District of Texas is an action *in rem* and has been such since it was first instituted in the Texas state court, and that adequate provisions for service of process in such an action upon nonresidents of the State of Texas appear in the Texas Statutes and Rules, Articles 1975, 1976, Vernon's Ann. Civil Statutes of Texas, and Rule 108 of Texas Rules of Practice and Procedure, and also in 28 U.S.C.A. Sec. 1655. The action in the United States District Court for the District of New Mexico is professedly strictly a suit *in rem*. The rule as to actions *in rem* has been stated in *Palmer* v. *State of Texas*, 212 U.S. 118, 125, 29 S. Ct. 230, 232, 53 L. Ed. 435, as follows:
>
> > 'If a court of competent jurisdiction Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same,

> such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty.'

See also, *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 229, 43 Sup. Ct. 79, 82, 67 L. Ed. 226."

In concluding the argument in support of Proposition 1, we most seriously request the Court to hold that the United States District Court for the Northern District of Texas could not acquire jurisdiction and to hold the judgment sought to be enforced as void for that reason.

Proposition 2.

The judgment rendered by the United States District Court for the Northern District of Texas was void by virtue of the denial to the petitioners of a jury trial after due and proper request in writing.

Proposition 2 presents the question with reference to the denial of a jury trial to the petitioners herein, and in connection with that matter we wish to present here to this Court the following:

The United States District Court for the Northern District of Texas denied a proper written demand for a jury trial.

In connection therewith, we wish to call to the Court's attention, Amendment Seven to the Constitution of the United States preserving the right to trial by jury and Rules of Civil Procedure, Rule Number 38.

In the case of *Bass* v. *Hoagland*, 172 F.2d 205, United States Court of Appeals, Fifth Circuit, Syllabus 9 is quoted as follows:

"A federal court judgment, whether in a civil or a criminal case, that is reached without due process of law is void and may be attacked collaterally by habeas corpus if for crime, or by resistance to its enforcement if a civil judgment for money. U.S.C.A. Const. Amend. 5."

Syllabus 10 is as follows:

"The denial of right of jury trial after demand in federal court is an unconstitutional abuse of power in absence of waiver. U.S.C.A., Const. Amend. 7."

As we read this opinion, it holds substantially that denial of a jury trial in a civil case is a violation of the due process of law clause and the judgment is void and subject to collateral attack.

We most respectfully ask this Court to read the last cited case in full. It will be noted that Judge Hutcheson dissented, but the opinion by the court passes squarely on the question here and holds that to deny a jury trial is a denial of due process of law, and in addition thereto held that the judgment was void for want of due process and subject to collateral attack. It will be noted, as said in this case, that if a judgment is void it is subject to collateral attack.

It would be difficult to read Amendment VII to the Constitution of the United States which is as follows:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

and after reading the same determine that the constitutional provision is not binding.

In the case at bar, as heretofore pointed out, the plaintiff in the state court sued the defendant Lewis in the state court and asked for judgment for some $35,000.00. Lewis answered and set out that he had paid certain amounts and that he was entitled to certain credits by reason of having paid freight and other obligations, that he was entitled to certain other credits by virtue of having returned merchandise, and that he was entitled to certain other cerdits because J. R. Watkins Company took personal property which belonged to Lewis or upon which he had a mortgage and sold it and did not give him credit. The question then was the question of payment and whether Watkins owed Lewis or Lewis owed Watkins. If Lewis had paid his obligation or if Watkins owed Lewis, then there could be no lien. The debt was the basis of the lien and must be first determined by a jury as any other disputed question of fact.

Rule 38, Rules of Civil Procedure, is as follows:

> "(a) RIGHT PRESERVED. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate."

This rule sets out, as quoted above, that the right to a trial by jury shall be preserved to the parties inviolate. The Circuit Court of Appeals, Second Circuit, in the case of *Beaunit Mills, Inc.* v. *Eday Fabric Sales Corp.*, 124 F.2d 563, said that even in an action for declaratory judgment the right to a trial by jury is to be determined upon the sub-

stantial basis of what are the issues, legal or equitable, and not upon the procedure utilized. The United States Supreme Court in the case of *Galloway* v. *United States*, decided in 1943, and found in 319 U.S. 372, 63 Sup. Ct. 1077, 87 L. Ed. 1458, said in substance that the Seventh Amendment does not require that issues be presented in the form prevailing in 1791, but that the substance of jury trial be preserved.

In the case of *Bruckman* v. *Hollzer* (C.C.A. 9th, 1946), 152 F.2d 730, there is an able discussion by Judge Denman, C. J., on the question of jury trials in cases involving both equitable and legal rights. In that case there was an action brought to prohibit or mandamus the trial judge to strike the demand for a jury trial and to hear and determine in equity the claim of the complainant. The Circuit Court of Appeals refused the writ and discussed at length the right to a jury trial in a case of this type.

It seems that the proper rule to apply in determining whether or not a jury trial is warranted would be to determine whether or not a jury trial would be warranted if J. R. Watkins Company sued the defendant Lewis, appellant here, on the note alone and Watkins pleaded, as he pleaded in this case, his complete set-off. The combining of a suit to foreclose a mortgage or lien with a suit for a debt does not deprive the defendant of his right to a trial by jury. In the last case cited, *supra*, the Circuit Court said in part as follows:

> "We agree with these judges that the Federal Rules of Civil Procedure make such a preservation of the demanded right of jury trial and that to that end the

trial judge is required to try and determine that issue before the others.

* * * * * * * *

"Rule 42(b) specifically gives the power to the court to prevent 'prejudice' such as that to the plaintiff's right to trial by jury by 'ordering a separate trial of any claim,' here by ordering first a separate common law trial by jury on the issue of damages, in which the issue of infringement and the amount of damages will be determined before the decision on the equitable issues."

A failure of the trial court to observe and follow the constitutional amendment cited *supra* and the Rule of Civil Procedure preserving the right to a trial by jury certainly denies due process of law. It is impossible to conceive how the rights of an American citizen could be abused and denied to him as in this case without denying him due process of law. In the case of *Bass* v. *Hoagland*, cited *supra*, United States Court of Appeals, Fifth Circuit, 172 F.2d 205, in the body of the opinion, the Circuit Court used this language:

"* * * We believe that a judgment, whether in a civil or criminal case, reached without due process of law is without jurisdiction and void, and attackable collaterally by habeas corpus if for crime, or by resistance to its enforcement if a civil judgment for money, because the United States is forbidden by the fundamental law to take either life, liberty or property without due process of law, and its courts are included in this prohibition. In *Johnson* v. *Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, 146 A.L.R. 357, the court was declared to have lost its jurisdiction in a trial for crime when it denied the constitutional right to the assistance of counsel. The right of jury trial, if not waived but denied after demand, the judge ursuping

the function of the jury, would seem to be similarly an unconstitutional abuse of power. * * * Rule of Civil Procedure 38 requires that the right be asserted by a demand for it. We have found no federal case which has treated as a mere procedural error a flat denial of a jury trial demanded in a civil case, though we have found none holding its denial to be by itself a good ground of collateral attack."

Again we say in conclusion that we would like to have some court other than the trial court pass upon this question. We think that the judgment is void and that this Court should not permit it to be enforced in this jurisdiction. The judgment is void from the admitted record and facts in this case for at least two reasons set forth.

CONCLUSION

In concluding this brief, we wish to say to the Court that this case presents two questions admitted from the record in this case.

1. Can the federal court acquire jurisdiction over the *res* in the state court? We think if the Court will decide this question under the record and authorities presented herein, the Court will hold beyond a question of a doubt that this judgment is absolutely void and if void it is, of course, subject to collateral attack.

2. The denial of a jury trial in violation of the constitutional rights and the rights as granted under the Rules of Civil Procedure we think also make the judgment void.

Surely, a citizen of the United States is entitled to have his rights protected by some court. The only court up to now that has passed upon the question was the court that rendered the judgment, namely the United States District Court for the Northern District of Texas. The Constitution and the Rule mentioned above simply mean, as we view it, that when a jury trial is demanded in writing in accordance with the rule, which is admitted by all parties that the judge cannot arbitrarily deny such party a jury trial any more than he can deny a person in a criminal case a jury trial or the benefit of counsel. To permit this judgment to stand, we think would be not only a gross injustice, but would be permitting recovery on void judgments. While we realize that this Court must either hold this judgment void or not void, and if void, of course, it is subject to collateral attack, but when this Court looks at the equity of the matter, we think it would shock the conscience of the Court. Here a man was denied a jury trial, his property worth a minimum admittedly of $30,000.00 sold for $2,000.00. Spencer Carver, trustee, bought it in so he has a profit of $28,000.00 and still has the judgment together with large attorney's fees, costs and interests, and Lewis has no off-sets of any kind. The District Court for the Northern District of Texas refused to permit him to remove the air-conditioning unit and refused to vacate the sale, which simply all goes to show that the court for some reason granted to Lewis no consideration whatsoever on any point or any question.

We therefore most respectfully request and ask this Honorable Court to hold that said judgment is void and

subject to collateral attack and to direct the lower court to enjoin the enforcement thereof in this jurisdiction.

Respectfully submitted,

JOHN B. OGDEN,
1408-1409 Liberty Bank Building,
Oklahoma City, Oklahoma,
Attorney for Petitioners.

November, 1956.

CERTIFICATE

I certify that I mailed a true and correct copy of this Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and Brief in Support of Petition for Writ of Certiorari to Spencer Carver, Trustee, c/o Biggers, Baker, Lloyd & Chandler, 2020 Republic National Bank Building, Dallas, Texas, by depositing the same in the United States Mail, with sufficient postage affixed thereon, on this the 27th day of November, 1956.

JOHN B. OGDEN

APPENDIX

OPINIONS BELOW

The issues on this petition concern the following decisions, being the judgment of the United States District Court for the Northern District of Texas (Dallas Division), the opinion of the United States Court of Appeals Fifth Circuit dismissing the appeal and opinion of the Court of Appeals Tenth Circuit.

1. The District Court on the 19th day of April, 1954, entered the following order:

> "On this the 19th day of April, 1954, came on regularly to be heard the motion by the defendant, J. D. Lewis and wife, Zelma Lewis, to dismiss this case as to such defendants on the ground that there was an identical prior suit in the District Court of Texas, and the Court having heard such motion and argument of counsel, and being of the opinion that such motion should be denied,
>
> "It Is Therefore Ordered by the Court that the motion to dismiss by the defendant J. D. Lewis and wife, Zelma Lewis, be and the same is hereby denied with the costs of such motion taxed to said defendant, J. D. Lewis and wife, Zelma Lewis.
>
> "Wm. H. Atwell,
> United States District Judge."

2. The District Court on the 2nd day of June, 1954, denied the following request for a jury trial:

> "MOTION AND REQUEST FOR JURY TRIAL
>
> "Comes now the defendants, J. D. Lewis and Zelma W. Lewis and shows to the Court that the issues presented by the pleadings filed in this case are of such a nature that the trial of the cause should be by jury.

These defendants, therefore, under Rule 38 of the Federal Rules of Civil Procedure now demand for jury trial in this case.

"Wherefore, these defendants, J. D. Lewis and Zelma W. Lewis, pray that this cause and all of the issues involved herein be presented before a jury.

"JOE B. THOMPSON,
Attorney for Defendants, J. D. Lewis and Zelma W. Lewis,"

without entering a written order, but the trial judge stated from the bench that he would take a pen and mark through the request and refuse the same, so there is no formal order on the motion and request for a jury trial.

3. The United States District Court entered on the 2nd day of June, 1954, the following order as shown in appendix, pages i to vii.

4. Motion for New Trial was filed and overruled.

5. Motion to Stay Execution was filed and overruled, and the following orders entered by the court:

(Title Omitted.)

"On this the 17th day of May, 1954, came on regularly to be heard the motion of the defendant United States of America to dismiss this cause as to such defendant, and the Court having heard such motion and argument of counsel and being of the opinion that such motion should be denied.

"It is Therefore Ordered by the Court that the motion to dismiss the defendant United States of America be and the same hereby is denied.

"WM. H. ATWELL,
United States District Judge.

"Approved as to form:

"JOHN C. FORD,
Assistant U. S. Attorney."

"ORDER OVERRULING MOTION FOR NEW TRIAL.
(Title Omitted.)

"On this the 28th day of June, 1954, came on regularly to be heard the Motion for New Trial by the defendants, J. D. Lewis and Zelma W. Lewis, and the movants came not, and came the respondents and announced ready on such motion, and the Court having heard such motion and the argument of counsel and being of the opinion that such motion should be overruled,

"It is Therefore Ordered, Adjudged and Decreed that the Motion for New Trial of the defendant, J. D. Lewis and Zelma W. Lewis be and the same is hereby denied.

"WM. H. ATWELL,
United States District Judge.

"Approved as to form:

"SPENCER CARVER,
Attorney for Plaintiff.

"JOHN C. FORD,
Attorney for United States.

"TED P. MacMASTER,
Attorney for City of Dallas.

"J. J. FAGAN,
Attorney for County of Dallas."

"ORDER DENYING STAY OF EXECUTION.
(Title Omitted.)

"On this the 28th day of June, 1954, came on regularly to be heard a motion of the defendants, J. D.

Lewis and Zelma W. Lewis, to stay execution in this cause for sixty days from the entry of judgment on June 8, 1954, and the movants came not and came the respondents and announced ready and the Court having heard such motion and the argument of counsel and being of the opinion that such motion should be denied,

"It Is Therefore Ordered, Adjudged, and Decreed that the motion to stay execution by the defendants, J. D. Lewis and Zelma W. Lewis, be and the same is hereby denied.

"WM. H. ATWELL,
United States District Judge.

"Approved as to Form:

"SPENCER CARVER,
Attorney for Plaintiff.

"TED P. MacMASTER,
Attorney for City of Dallas.

"J. J. FAGAN,
Attorney for County of Dallas.

"JOHN C. FORD,
United States Attorney."

6. No notice of appeal was filed.

7. Thereafter a Motion to Vacate the Judgment was filed, Motion to Set Aside Sale was filed, Motion for Order to Remove Personal Property was filed, and the following formal order was entered by the United States District Court as follows:

"ORDER OVERRULING MOTIONS TO VACATE JUDGMENT, TO SET ASIDE SALE AFTER JUDGMENT AND TO REMOVE PERSONAL PROPERTY.

(Title Omitted.)

"On this the 29th day of November, 1954 came on regularly to be heard motions by J. D. Lewis, defendant to vacate the judgment herein, to set aside the sale after judgment and to remove personal property and came movant and announced ready and came Spencer Carver, Trustee, one of the respondents and announced ready and the Court proceeded to hear such motions, the evidence offered thereunder, and the argument of counsel and being of the opinion and finding that such motions and each of them should be in all things overruled and denied.

"It Is Therefore Ordered, Adjudged and Decreed that the motion to vacate the judgment herein by the defendant, J. D. Lewis be and the same is hereby in all things overruled and denied.

"It Is Further Ordered, Adjudged and Decreed by the Court that the motion of J. D. Lewis, defendant herein to set aside the sale after judgment herein be in all things overruled and denied.

"It Is Further Ordered, Adjudged and Decreed by the Court that the motion of J. D. Lewis, defendant herein to remove personal property from real estate heretofore sold under the judgment herein be and the same is hereby in all things overruled, and denied.

"It Is Further Ordered, Adjudged and Decreed by the Court that all costs of such motion be and the same is hereby taxed to the defendant, J. D. Lewis and for which let execution issue.

"To which findings and orders of the Court the said defendant, J. D. Lewis then and there in open Court duly excepted.

"WM. H. ATWELL,
United States District Judge.

"Approved as to form:

"SPENCER CARVER,
(Spencer Carver),
Trustee, Respondent.

"JOHN B. OGDEN,
(John B. Ogden),
Attorney for Movant,
J. D. Lewis."

8. Notice of appeal was thereafter given which is as follows:

"NOTICE OF APPEAL TO COURT OF APPEALS FIFTH CIRCUIT.

"Filed Dec. 7, 1954.

"In the United States District Court for the Northern District of Texas, Dallas Division.

"Spencer Carver, Trustee, Plaintiff.

v. No. 5511—Civil.

"United States of America, et al., Defendants.

"Notice is hereby given that J. D. Lewis, one of the defendants in the above styled and numbered cause hereby appeals to the Court of Appeals for the Fifth Circuit from the Order of this Court entered herein on the 29th day of November, 1954, wherein said Court by its Order overruled and denied the Motion to Vacate the Judgment filed by the defendant, J. D. Lewis; wherein the Court by said Order overruled and denied the Motion of J. D. Lewis, defendant herein, to set

aside sale after judgment; wherein the Court overruled and denied the motion of J. D. Lewis, defendant herein, to remove personal property from real estate heretofore sold under judgment, said Order denying said motions, being rendered by this Court on the 29th day of November, 1954, and to which action of the Court the defendant duly excepted.

"JOE B. THOMPSON,
and

"Ardmore, Oklahoma.

"JOHN B. OGDEN,

"By JOHN B. OGDEN,
(John B. Ogden).

"1408-9 Liberty Bank Bldg.,
Oklahoma City, Oklahoma.

"I hereby certify that I delivered a true and correct copy of said motion to Spencer Carver, Trustee, plaintiff c/o Biggs, Baker, Lloyd & Carver, 2020 Republic Bank Bldg., Dallas, Texas, and to John Ford, Assistant United States District Attorney, P. O. Building, Dallas, Texas, by depositing in the United States Mail said notice addressed to the above parties.

"JOHN B. OGDEN,
(John B. Ogden)."

9. Bond for Appeal was filed and the case was presented to the United States Court of Appeals, Fifth Circuit, which Court entered the following judgment as shown in appendix, ix to xi.

10. Thereafter within time, Petition for Rehearing was filed in the Court of Appeals, Fifth Circuit, and by the Court denied without formal opinion as evidenced by a letter as follows:

"OFFICE OF THE CLERK
"UNITED STATES COURT OF APPEALS
Fifth Circuit

"John A. Feehan, Jr.,
Clerk

New Orleans 6, La.
July 29, 1955.

"John B. Ogden
"Attorney at Law
"Oklahoma City, Oklahoma

"Dear Sir:

"I beg to advise you that the Court today entered an order denying the Petition for the Rehearing *in re*—No. 15508, J. D. LEWIS v. SPENCER CARVER, Trustee, et al.

"No opinion was rendered in connection therewith.

"Very truly yours,

"/s/ John A. Feehan, Jr.
"John A. Feehan, Jr.,

"Clerk."

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15508

J. D. LEWIS,

Appellant,

VERSUS

SPENCER CARVER, Trustee, ET AL.,

Appellees.

Appeal from the United States District Court for the Northern District of Texas.

(June 30, 1955.)

Before HUTCHESON, Chief Judge, JONES, Circuit Judge, and CHRISTENBERRY, District Judge.

HUTCHESON, Chief Judge: On June 2, 1954, the court from which this appeal comes entered a judgment in the aggregate amount of $64,978 on several claims against J. D. Lewis, fixed the priorities of the several liens securing same, and ordered their foreclosure according to law on the East one-half of Lot 1, Block 5, Subdivision of W. H. Gaston Homestead and Lot 11, Block 2, Mount Auburn Addition, both in Dallas, Texas, and execution in favor of each plaintiff for the balance remaining unpaid after crediting the proceeds of the foreclosure sale.

Motions for new trial and for stay of execution on the judgment were filed by Lewis and wife, and denied on June 28, 1954, and, pursuant to an order of sale, the properties were, on September 14, 1954, sold by the United States Marshal.

Thereafter, on November 4, 1954, J. D. Lewis and wife filed three motions in the cause: (1) a motion to vacate the judgment on the ground that the state court had first acquired jurisdiction of the *res*, and the federal court, therefore, was without jurisdiction to proceed; (2) a motion to set aside the sale for gross inadequacy of price; and (3) a motion to be allowed to remove from the property sold, as a removable fixture and not covered by the mortgage, an air-conditioning plant.

On November 29, 1954, the court entered an order denying each of the motions, and movants appealing therefrom are here urging upon us: that each of them should have been granted; and that the orders appealed from must be reversed.

Appellees insisting that on their merits the motions are wholly without substance or merit, urge upon us in a motion to dismiss, filed March 12, 1955, which we have considered with the merits of the case, that the motion to vacate the judgment was not an appealable order, and, filed as it was after the judgment had become final, it did not extend the time for appealing from it under *United States* v. *Muschany*, 156 F(2) 196; *French* v. *Jeffries*, 161 F(2) 97; and similar cases; and that the appeal as a whole should be dismissed because there is no merit or substance in any of the points made and because the appellant, without cause and without obtaining an order for delay, has failed to diligently prosecute his appeal and has misused and abused the rules of procedure for the purpose of obstructing the collection of the final judgment.

We agree that the order denying the motion to set aside the judgment, filed after it had become final, is not an appealable order.

As to the other point in appellees' motion, that the appeal is without substance as to any of the orders appealed from, and that, while we have the discretion to

excuse the failure to prosecute an appeal with diligence and in accordance with the rules if a search of the record shows the appeal to be meritorious[1], an examination of the briefs and record in this case shows that, as contended by appellees in their motion, the appeal is without merit or substance and that it would be an abuse of our discretion to entertain the appeal, notwithstanding the appellant's *dilitoriness*, only to hold it completely without merit.

The motion to dismiss will, therefore, be GRANTED and the appeal will be DISMISSED.

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[1] *Arline* v. *Brown*, 181 F(2) 183; *Ispass* v. *Pyramid*, 330 U.S. 695.

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Fifth Circuit.

FILED

United States Court of Appeals
Tenth Circuit
Oct. 1, 1956
Robert B. Cartwright
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 5387—SEPTEMBER TERM, 1956

J. E. LEWIS and ZELMA W. LEWIS,
Appellants,

v.

SPENCER CARVER, Trustee,
Appellee.

Appeal from the United States District Court
for the Eastern District of Oklahoma.

John B. Ogden (Joe B. Thompson was with him on the brief) for Appellants.

Spencer Carver pro se for Appellee.

Before BRATTON, Chief Judge, PHILLIPS and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

Appellants seek to restrain execution upon a partially unsatisfied judgment originally entered against them and in favor of appellee by the United States District Court for the Northern District of Texas and now registered in the United States District Court for the Eastern District of Oklahoma. Appellants assert the Texas judgment to be void from lack of jurisdiction.

A review of the proceedings in the District Court for the Northern District of Texas reveals that each point now urged upon this court was likewise urged upon the Texas District Court; that the matter was appealed to the United States Court of Appeals, Fifth Circuit, and presented fully to that court and that certiorari was sought from but denied by the United States Supreme Court. *J. D. Lewis* v. *Spencer Carver, Trustee*, 223 F.2d 867; *certiorari denied* 350 U. S. 883, 76 S. Ct. 135, 100 L. Ed. 78, *rehearing denied* 350 U. S. 926, 76 S. Ct. 211, 100 L. Ed. 139. Each ruling of those courts has been adverse to appellants' contentions.

Notwithstanding appellants have thrice before attacked the jurisdiction of the Texas Court they now insist that no court has passed upon the merits of their contentions

because the appeal to the Fifth Circuit was concluded by that court's order dismissing the appeal. However, this argument is completely negatived by the decision of the Fifth Circuit wherein it is stated that the motion to dismiss "* * * which we have considered with the merits of the case * * *" is granted.

Where it appears that a cause has been duly considered upon its merits, regardless of the technical order issued in disposition of the cause, the matter is at rest and cannot be again heard on the same issues between the same parties in the manner herein sought.

Jurisdictional questions are subject to the principles of *res judicata* and appellants cannot now be heard anew upon the merits. *American Surety Company* v. *Baldwin*, 287 U.S. 156, 53 Sup. Ct. 98, 77 L. Ed. 231. As Mr. Justice Reed has so tersely stated: "One trial upon an issue is enough." *Treinies* v. *Sunshine Mining Company*, 308 U.S. 66, 60 Sup. Ct. 44, 84 L. Ed. 85, *Reh. den.*, 309 U.S. 693, 60 Sup. Ct. 464, 84 L. Ed. 1034.

The judgment and order of the trial court dismissing appellant's complaint is affirmed.